

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TRAPPER TYRELL)	
Claimant)	
)	
VS.)	
)	
ENERGY GUARD, LLC)	
Respondent)	
)	Docket No. 1,066,199
AND)	
)	
INSURANCE COMPANY UNKNOWN)	
Insurance Carrier)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 7, 2014, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent. John C. Nodgaard of Wichita, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

The Administrative Law Judge (ALJ) found claimant's June 17, 2013, accident occurred within the course and scope of his employment with respondent. Moreover, the ALJ found claimant did not deviate from the course and scope of his employment, nor did he violate any of respondent's safety regulations. The ALJ ordered temporary total disability payments paid for the period of June 18, 2013, through August 8, 2013, and ordered respondent to pay as authorized claimant's medical bills.¹ This order was assessed against the Fund.

¹ See P.H. Trans. (Dec. 5, 2013), Cl. Ex. 1.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 21, 2014, Preliminary Hearing and the exhibits; the transcript of the December 5, 2013, Preliminary Hearing and the exhibits; and the transcript of the October 17, 2013, video deposition of claimant and the exhibits; together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the ALJ's Order should be reversed. First, respondent maintains the ALJ lacked jurisdiction to issue a preliminary Order because claimant followed no procedural prerequisites prior to scheduling the preliminary hearings of December 5, 2013, and January 21, 2014.² Further, respondent argues:

The preliminary order was improperly issued in light of the ALJ's earlier order which indicated that no determination would be made on the Fund's defenses until the final award. The preliminary order was also issued without giving the Fund and respondent the opportunity to present evidence, including the investigating officer's testimony on the disputed issues.³

Respondent argues existing evidence proves claimant's accident did not arise out of and in the course of his employment with respondent, as he had not yet assumed the duties of his employment at the time of the accident. Alternatively, respondent maintains even if claimant was working at the time of the accident, his reckless disregard of respondent's workplace safety rules and violation of Kansas state law disallows compensation in this case.

The Fund concurs and supports the arguments and authorities as outlined in Respondent's Brief, although it takes no position at this time with respect to whether the ALJ erred by ordering payment of past medical bills at preliminary hearing.

Claimant argues he sustained his burden of proving personal injury by accident arising out of and in the course of his employment with respondent. Claimant states he was on the most direct route to a scheduled sales appointment and thus was working at the time of his accident. Additionally, claimant contends he did not commit a reckless violation of respondent's workplace safety rules. Further, claimant maintains respondent and the Fund raised no procedural objections prior to respondent's appeal to the Board. Claimant argues the court file includes a Seven-Day Demand and Notice of Intent to File an Application for Preliminary Hearing, an Application for Hearing, a Notice of Hearing: Application for Preliminary and Regular Hearing, and three Notices of Preliminary Hearing,

² See K.S.A. 2012 Supp. 44-534a(a)(1), (2).

³ Respondent's Brief (filed Feb. 24, 2014) at 5-6.

all of which were served on respondent. Claimant contends the ALJ's Order should be affirmed in all respects.

The issues for the Board's review are:

1. Does the ALJ have jurisdiction to issue a preliminary order when claimant failed to complete the procedural prerequisites defined by K.S.A. 2012 Supp. 44-534a(a)(1)?
2. Did the ALJ err by ordering the payment of past medical bills by the Fund for conditions and medical treatment incurred prior to February 7, 2014, the date of the preliminary Order?
3. Did claimant's injuries arise out of and in the course of his employment with respondent?
4. Are benefits barred by K.S.A. 44-501(a)(1) for reckless violation of respondent's workplace safety rules?

FINDINGS OF FACT

Court records include an Application for Hearing and an Application for Preliminary Hearing filed by claimant on July 18, 2013. A Notice of Hearing: Application for Preliminary and Regular Hearing was issued to the parties on July 23, 2013. Claimant filed a Notice of Preliminary Hearing on July 31, 2013. On August 8, 2013, the parties entered an Agreed Preliminary Medical Treatment Order in which the Fund agreed to pay for claimant's ongoing medical treatment pending a final determination. A preliminary hearing was then set for August 15, 2013. No hearing was held, but the ALJ ordered the Fund to pay temporary total disability benefits from August 8, 2013, and reimburse claimant for out-of-pocket medical expenses per the parties' agreement. Also in the August 15, 2013 Order, the ALJ deferred decision on the Fund's and respondent's defenses pending regular hearing.⁴

Claimant filed a Notice of Preliminary Hearing with the court on November 18, 2013. The preliminary hearing was held December 5, 2013, and the parties agreed at that time to continue the preliminary hearing to obtain additional evidence. Claimant again filed a Notice of Preliminary Hearing on December 19, 2013. The continued preliminary hearing occurred January 21, 2014, after which the ALJ issued the Order on appeal.

Claimant began employment with respondent in October 2011 as a project manager, which claimant described as essentially a salesperson. The position required

⁴ ALJ Order (Aug. 15, 2013).

claimant to travel to various locations in Kansas and Oklahoma and present respondent's products to potential customers. Claimant testified he worked from his home, though he went to respondent's office every Monday for a weekly meeting and to obtain his paycheck. Claimant was paid weekly on a commission basis. Respondent did not provide transportation or compensation for mileage, fuel, or overnight accommodations. Claimant was assigned leads by respondent and did not personally schedule appointments.

On June 17, 2013, claimant was scheduled to run two leads in Caldwell, Kansas. Claimant's first appointment was scheduled for 5:00 p.m. Claimant testified the travel time from his home outside of Bentley, Kansas, to Caldwell, Kansas, was "a little over an hour,"⁵ and he believes he left his home in his personal vehicle at approximately 3:00 p.m. Claimant stated he traveled via his regular route to Caldwell, Kansas, moving south along smaller paved roads instead of larger highways because the distance is less:

Coolidge [*sic*], yes.⁶ You can go through [Colwich], and then you start heading south through [Colwich], and that will take you through Goddard. And then once you go down through Goddard, then you can hop on K42.

It saves me about – saves about ten to fifteen miles of driving. And at that time of day, there is a lot less traffic that way too. So it was just – And it's just a lot easier. It's a lot easier route.⁷

According to the Kansas Motor Vehicle Accident Report,⁸ claimant, traveling south on 183rd St. W, failed to stop at the stop sign at 183rd St. W and MacArthur Rd. and was struck by an oncoming vehicle in the intersection. Claimant was extricated from his overturned vehicle by emergency personnel and immediately transported via ambulance to Via Christi Hospital on St. Francis in Wichita, Kansas, for what became code red injuries. Claimant has no recollection of the accident or the moments leading to the accident. Claimant testified he was in a medically-induced coma, and the first thing he can remember is waking up in the hospital approximately three or four weeks following the accident. He remained at Via Christi Hospital until July 24, 2013.

Claimant sustained "cervical spine trauma including C3-C4 laminar fracture as well as left humeral shaft fracture, being treated conservatively with residual ASIA-C and bilateral C5-level tetraplegia."⁹ Claimant was transported to Madonna Rehabilitation

⁵ P.H. Trans. (Dec. 5, 2013), Cl. Ex. 2 at 13.

⁶ The errata sheet attached to claimant's deposition indicates all mention of "Coolidge" should read "Colwich." [P.H. Trans. (Dec. 5, 2013), Cl. Ex. 2].

⁷ P.H. Trans. (Dec. 5, 2013), Cl. Ex. 2 at 25.

⁸ P.H. Trans. (Dec. 5, 2013), Cl. Ex. 2, Exhibit 1 at 1.

⁹ P.H. Trans. (Dec. 5, 2013), Cl. Ex. 1 at 44.

Hospital in Lincoln, Nebraska, where he underwent daily rehabilitation beginning August 8, 2013, through his release in December 2013. Claimant testified he improved during rehabilitation, regaining limited use of his right hand, right leg, abdominal muscles, and back muscles. Claimant must use a wheelchair equipped with side braces.

Regarding vehicle safety and security rules, respondent's Employee Handbook states:

Refrain from using cellular telephones unless they are equipped with hands-free operations, to include sending or receiving text messages, personal listening devices, and from conducting any other activities which may impede the driver's ability to focus on safely operating the vehicle while it is in motion.

Comply with the respective Local, State and Federal laws governing motor vehicle operations.¹⁰

Claimant's cellular telephone records of June 17, 2013, indicate he made two calls near the time of accident: one at 3:58 p.m. and one at 3:59 p.m. Claimant testified:

. . . If you look on that sheet, it will say that both calls were one minute. Generally when you have a one-minute call, it's going to be voice mail, goes to their voice mail, you know.

And I want to tell you that I did have a blue tooth installed in my car, so I used that, but neither one of them have indicated talking to me at the time of the accident.¹¹

Claimant stated he does not generally leave voice mail messages, and neither party told him whether he left a message that day.

The accident report indicated claimant's driver's license is restricted Code C (Mechanical Aid - attached to car).¹² Claimant explained an ignition interlock was required on his vehicle from March 9, 2011, through March 9, 2012. Claimant testified the only current restriction on his driver's license is Code B (Corrective Lenses), of which he was in compliance on the date of the accident. The accident report had no indication of a restriction Code B on claimant's driver's license and listed claimant's former address in Hutchinson, Kansas. Deputy Robert Abril, the officer at the scene of the accident, was scheduled for deposition on January 31, 2014. The ALJ noted in his Order:

¹⁰ P.H. Trans. (Dec. 5, 2013), Fund Ex. 4 at 28.

¹¹ P.H. Trans. (Dec. 5, 2013), Cl. Ex. 2 at 36.

¹² *Id.*, Exhibit 1 at 3; P.H. Trans. (Dec. 5, 2013), Fund Ex. 3 at 1.

This order was delayed pending a scheduled January 31, 2014 deposition of a police officer about the accident. That evidence is not of record for this determination, nor has it been entered into evidence.¹³

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b states in part:

- (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
- (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
- (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-501(a)(1) states in part:

- (a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:
 - (A) The employee's deliberate intention to cause such injury;
 - (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
 - (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
 - (D) the employee's reckless violation of their employer's workplace safety rules or regulations; or

K.S.A. 2012 Supp. 44-501(a)(2) states:

Subparagraphs (B) and (C) of paragraph (1) of subsection (a) shall not apply when it was reasonable under the totality of the circumstances to not use such equipment, or if the employer approved the work engaged in at the time of an accident or injury to be performed without such equipment.

K.S.A. 2012 Supp. 44-508(f)(3)(B) states:

¹³ ALJ Order (Feb. 7, 2014) at 1.

The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2012 Supp. 44-534a(a)(1) states, in part:

At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁴ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁵

¹⁴ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹⁵ K.S.A. 2013 Supp. 44-555c(j).

ANALYSIS

1. Does the ALJ have jurisdiction to issue a preliminary order when claimant failed to complete the procedural prerequisites defined by K.S.A. 2012 Supp. 44-534a?

This issue was not raised before the ALJ. The Board has held that in appeals pursuant to K.S.A. 44-534a, issues not raised before the ALJ cannot be raised for the first time on appeal. To hold otherwise would place the Appeals Board in the position of attempting to decide an issue based upon an incomplete record and would deny claimant the benefit of evidence that may have been presented if he had been aware there was a dispute as to such issue at preliminary hearing.¹⁶

Had the issue been raised before the ALJ, the Appeals Board has held in the past, and continues to hold, the ALJ retains jurisdiction over the parties and the issues presented at the initial preliminary hearing. Therefore, later hearings conducted to address those same preliminary hearing issues are treated as a continuation of the initial preliminary hearing and do not require claimant to file a new Notice of Intent and Application for Preliminary Hearing. This interpretation of the Act affords the parties expeditious hearings and avoids cumbersome procedures that would only serve to delay a prompt decision.¹⁷

2. Did the ALJ err by ordering the payment of past medical bills by the Fund for conditions and medical treatment incurred prior to February 7, 2014, the date of the preliminary Order?

K.S.A. 2012 Supp. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation, and the payment of temporary disability compensation. K.S.A. 2012 Supp. 44-534a also specifically gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. K.S.A. 2012 Supp. 44-551(i)(2)(A) gives the Board jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. K.S.A. 2012 Supp. 44-534a (a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified therein.

¹⁶ *Vanetta v. Southwest Manufacturing Company*, No. 216,635, 1996 WL 757386 (Kan. WCAB Dec. 19, 1996); see *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966).

¹⁷ *Frontado v. Rubbermaid Specialty Products*, No. 217,058, 1999 WL 1113626 (Kan. WCAB Nov. 29, 1999), citing *Blue v. LSC*, No. 236,567, 1999 WL 123259 (Kan. WCAB Feb. 5, 1999) and *Morales v. Excel Corporation*, No. 220,221, 1999 WL 55371 (Kan. WCAB Jan. 29, 1999).

The issue whether a worker is entitled to medical compensation is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing. "Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly."¹⁸ This Board member finds the ALJ has jurisdiction to determine if medical treatment is necessary for a compensable injury. Therefore, this issue is not one of which the Board takes jurisdiction in an appeal of a preliminary order

3. Did claimant's injuries arise out of and in the course of his employment with respondent?

Respondent argues the "going and coming" rule in defense of the claim. Generally, if an employee is injured while on his or her way to assume the duties of employment or after leaving such employment, the injuries are not considered to have arisen out of and in the course of employment under K.S.A. 2012 Supp. 44-508(f)(3)(B). This rule is known as the "going and coming" rule.¹⁹ The rationale for the "going and coming" rule was explained in *Thompson*:²⁰ "[W]hile on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment. [Citations omitted.]" "[T]he question of whether the 'going and coming' rule applies must be addressed on a case-by-case basis." [Citation omitted.]²¹

K.S.A. 2012 Supp. 44-508(f)(3)(B) is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.²²

K.S.A. 2012 Supp. 44-508(f)(3)(B) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the

¹⁸ *Allen v. Craig*, 1 Kan. App. 2d 301, 303 and 304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

¹⁹ See *Chapman v. Beech Aircraft Corp.*, 20 Kan. App. 2d 962, 894 P.2d 901, *aff'd* 258 Kan. 653, 907 P.2d 828 (1995).

²⁰ *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

²¹ *Chapman v. Beech Aircraft Corp.*, 20 Kan. App. 2d at 964; see *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, Syl. ¶ 3.

²² *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, Syl. ¶ 1, 416 P.2d 754 (1966).

employer's premises.²³ Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.²⁴

In addition to the specific language contained in K.S.A. 2012 Supp. 44-508(f)(3)(B), Kansas courts have long recognized an exception to the "going and coming" rule where travel is an intrinsic part of the employee's job.²⁵ Our Supreme Court noted that when travel becomes an intrinsic part of the job it is an element of employment.²⁶ Based upon the testimony of claimant there is little doubt travel is an intrinsic part of his job. Clearly, the intrinsic travel exception applies to the facts presented in this case.

Except for Mondays, when claimant went to the company office for a staff meeting, he worked out of his home as his office. Only occasionally did claimant have customer appointments on a Monday. On June 17, 2013, claimant had two early evening appointments in Caldwell, Kansas. After the morning meeting, claimant ran errands and went home. Later in the day, he drove to Caldwell from his home, which was his usual custom.

Respondent argues claimant was not yet on his way to meet the customer when the accident occurred. To the contrary, the intersection of 183rd St. W and MacArthur Rd. is located directly between claimant's home in Bentley, Kansas, and the location of the customer in Caldwell, Kansas. This Board Member finds claimant was on his way from his home office to the customer's location. At the time of his accidental injury, claimant was in the service of and performing a task for the benefit of the employer.

4. Are benefits barred by K.S.A. 44-501(a)(1) for reckless violation of respondent's workplace safety rules?

Respondent argues claimant committed a reckless violation of respondent's workplace safety rules by running a stop sign. The safety rule is generic and requires employees to "comply with the respective Local, State and Federal laws governing motor vehicle operations."²⁷

²³ *Thompson*, 256 Kan. 36, Syl. ¶ 1. The court held that the term "premises" is narrowly construed to be an area controlled by the employer.

²⁴ *Thompson*, 256 Kan. at 40.

²⁵ *Scott v. Hughes*, 294 Kan. 403, 414, 275 P.3d 890, citing *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 289, 144 P.3d 668 (2006); *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 277, 899 P.2d 1058 (1995).

²⁶ *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 289, 144 P.3d 668 (2006).

²⁷ P.H. Trans. (Dec. 5, 2013), Fund Ex. 4 at 28.

This case is similar to *Morris v. County of Gove, Inc.*²⁸ In *Morris*, the Respondent argued because a highway patrol trooper concluded claimant was speeding when his accident occurred compensation should be disallowed based upon K.S.A. 44-501(d)(1) as his speeding was analogous to a failure to use a safety device.²⁹ The ALJ and the Board disagreed. The Board wrote:

Claimant's actions may well have been careless and negligent but the evidence does not rise to the level that his actions were intentional and deliberate. And the majority of cases involving violation of traffic laws such as speeding have failed to find willful misconduct on the strength of the violation.³⁰

The burden of a “reckless violation” appears less strict than that imposed by the “willful failure” burden. In *Wiehe*,³¹ the Kansas Supreme Court quoted Restatement (Second) of Torts § 500 (a) (1965), pp. 587-588:

“Types of reckless conduct. Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.

“For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk. . . .

“For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.”

²⁸ *Morris v. County of Gove*, No. 1,022,983, 2006 WL 1275456 (Kan. WCAB Apr. 27, 2006).

²⁹ *Id.* at 3.

³⁰ *Id.* at 4-5, citing *Larson's Workers' Compensation Law*, § 37.03.

³¹ *Wiehe v. Kukal*, 225 Kan. 478, 483-84, 592 P.2d 860 (1979).

K.S.A. 2012 Supp. 21-5202(j) states:

A person acts “recklessly” or is “reckless,” when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

In order for claimant’s failure to yield to the stop sign to be willful or reckless for the purposes of K.S.A. 2012 Supp. 44-501(a), there must be some showing of intent. There is nothing in the record that supports claimant willfully ran the stop sign. The facts of the case support claimant suffered an accident in the purest sense.

Finally, respondent argues claimant committed a reckless violation of respondent’s safety rules by driving without an ignition interlock device and running the stop sign. Respondent cites cases from other jurisdictions in support of their argument. This Board Member is not persuaded by the cases from other jurisdictions. Kansas law regarding reckless conduct is set forth in the statute and case law and needs no outside direction from states whose courts may be dealing with statutory language not identical to Kansas and courts that may interpret the law differently.

Respondent relies primarily on the testimony of Robert Abril to prove claimant was required to have an ignition interlock device on his vehicle. Mr. Abril’s deposition transcript is not in evidence before the ALJ and will not be considered here. Counsel for respondent told the ALJ at the preliminary hearing on January 21, 2014, Mr. Abril’s deposition was scheduled for January 31, 2014. K.S.A. 2012 Supp. 44-534a requires the ALJ to render a decision within five days of the conclusion of a preliminary hearing, which in this case was January 31, 2014. The transcript of Mr. Abril’s deposition was not filed with the Division until February 27, 2014.

The only other evidence in the record relating to the ignition interlock device is the Fund’s Exhibit 2, admitted into evidence at the December 5, 2013, preliminary hearing, and Claimant’s Exhibit 1, admitted into evidence at the January 21, 2014, preliminary hearing. The exhibits include information regarding the requirement of an ignition interlock by the Kansas Department of Revenue in effect from March 9, 2011, to March 9, 2012. The accident giving rise to this claim occurred after the ignition interlock device requirement ended. The evidence in the record fails to support respondent’s argument.

CONCLUSION

The ALJ had jurisdiction to issue a preliminary order. The Board does not have the jurisdiction to review an order for the payment of medical compensation by the ALJ. Claimant suffered an accidental injury on June 17, 2013, arising out of and in the course of his employment with respondent. Benefits are not barred by K.S.A. 2012 Supp. 44-501(a)(1).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated February 7, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2014.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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